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JUSTICE HOLMES AND THE LAW OF TORTS

AS I look over the long list of judges of American Supreme Courts, and even over the much shorter one of those who achieved eminence or possessed originality (and these two are not always the same), Justice Holmes seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed. His opinions present themselves as instances naturally serving to exhibit this general body of principles in application. The framework is his own, and not some orthodox commentator's. Shaw, Bronson, Tilghman, Lumpkin senior, Gaston, Ryan, Field (of Massachusetts), Doe, Gibson, Walworth, Blackford, Nelson, Mitchell, Beasley, Napton, Selden, Daly, Appleton, Goldthwaite, — none of these (not to mention living ones) give the impression of having worked out, themselves, and for their own use, an harmonious construction of general principles. I suppose that Kent came the nearest to doing it.

Another trait of his opinions, and one that adds to their fascination, is the epigram instinct, which will not be suppressed. Wise maxims, sententious summaries, and pithy brocards strew the pages. Only Lord Bowen can be compared with him in this: "A horsecar cannot be handled like a rapier."¹ — "Nowadays we do not require pleadings to be guarded against all the possible distortions of perverse ingenuity."² — "A man cannot shift his misfortunes to his neighbor's shoulders."³ — "A man cannot justify a libel by proving that he had contracted to libel."⁴ — "Most differences are merely differences of degree, when nicely analyzed."⁵ — "The taste of any public is not to be treated with contempt."⁶ — "No falsehood is thought about or even known by all the world; no conduct is hated by all."⁷ — "Every calling is great when

¹ *Hamilton v. West End St. R. Co.*, 163 Mass. 199, 39 N. E. 1010 (1895).

² *Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398 (1897).

³ *Spade v. Lynn & Boston R. Co.*, 172 Mass. 488, 52 N. E. 747 (1899).

⁴ *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619 (1900).

⁵ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1889).

⁶ *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239 (1903).

⁷ *Peck v. Tribune Co.*, 214 U. S. 185 (1909).

greatly pursued.”⁸ — “The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug.”⁹ — “The law constantly is tending towards consistency of theory.”¹⁰ — “A trespasser is not *caput lupinum*.”¹¹ — “There is no general policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.”¹²

No doubt, as a stylist, he is unique and unapproached. There have been others — Doe, Mansfield, Jessel, Camden, to name a few — but none in his *genre*, except Bowen.

Another commanding thing is the philosophy of life at large which decorates and dignifies his technical lore of the law. Truth in general is invoked for the decision of legal truth: “The moment you leave the path of merely logical deduction, you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless.”¹³ — “One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society disguised under the name of capital to get his services for the least possible return.”¹⁴ — “Free competition is worth more to society than it costs.”¹⁵ — “Nature has but one judgment on wrong conduct, . . . the judgment of death. If you waste too much food, you starve; too much fuel, you freeze; too much nerve tissue, you collapse.”¹⁶ — “If a man is adequate in native force, he probably will be happy in the deepest sense, whatever his fate.”¹⁷ — “If education could make men realize that you cannot produce something out of nothing, and make them promptly detect the pretense of doing so with which at present the talk of every day is filled, I should think it had more than paid for itself.”¹⁸ — “We have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her

⁸ Suffolk Bar Dinner, 1885.

⁹ “Ideals and Doubts,” 10 ILL. L. REV. 1.

¹⁰ *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462 (1893).

¹¹ *Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909 (1899).

¹² 8 HARV. L. REV. 6.

¹³ *Ibid.*, at p. 9. This piece of wisdom is a favorite and reappears in all sorts of quarters.

¹⁴ *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896).

¹⁵ *Ibid.*

¹⁶ Address at Northwestern University, 1902.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

axe and cord, and will scale the ice, the one and only success which it is his to command is to bring to his work a mighty heart.”¹⁹ — “All that life offers any man from which to start his thinking or his striving is a fact. . . . And it does not very much matter what that fact is; for every fact leads to every other by the path of the air.”²⁰ — “The main part of intellectual education is not the acquisition of facts, but learning how to make facts live.”²¹ — “The man of action has the present, but the thinker controls the future.”²² — “The labor of lawyers is an endless organic process; the organism whose being is recorded and protected by the law is the undying body of society.”²³ — “I do not believe that the justification of science and philosophy is to be found in improved machinery and good conduct. Science and philosophy are themselves necessities of life. By producing them, civilization sufficiently accounts for itself.”²⁴ — “Our ideal is repose, perhaps because our destiny is effort, just as the eyes see green after gazing at the sun.”²⁵ — “Although one believes in what commonly (with some equivocation) is called necessity — that phenomena are always found to stand in quantitatively fixed relations to earlier phenomena — it does not follow that without such absolute ideals we have nothing to do but sit still and let Time run over us. The mode in which the inevitable comes to pass is through effort. Consciously or unconsciously, we all strive to make the kind of a world that we like.”²⁶

The tendencies of humanity are seen to flow through and about and behind the myriad instances of the law’s precedents. His philosophy of life appears in his judgments.

And yet the Bar does not, after all, see the whole of it, nor the greatest part of it, in those opinions. To find it, one must consult the little volume (privately printed) of “Speeches.” This is not the place to descant upon its varied treasures. But two of its most recurrent principles are these: Life, as a fact, is a stern, endless

¹⁹ Memorial Day Address, 1884.

²⁰ Lecture on the Profession of the Law, 1886.

²¹ Oration before the Harvard Law School Association, 1886.

²² Eulogy on Sidney Bartlett, 1889.

²³ Eulogy on Daniel S. Richardson, 1890.

²⁴ Speech at the Yale University Alumni Dinner, 1891.

²⁵ Eulogy on William Allen, 1891.

²⁶ “Ideals and Doubts,” 10 ILL. L. REV. 1.

struggle of interests, and government can merely mitigate and regulate its conditions; and, Life, as a purpose and a career, is an effort to reach an unattainable ideal; the ideal (not the actual) *must* be the aim, we *must* strive, yet it is *never* attainable.

"We accept our destiny to work, to fight, to die for ideal aims. At the grave of a hero who has done these things we end not with sorrow at the inevitable loss, but with the contagion of his courage; and with a kind of desperate joy we go back to the fight."

"The rule of joy and the law of duty seem to me all one. . . . From the point of view of the world, the end of life is life. Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself."

"Life is a roar of bargain and battle; but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole, and transmutes the dull details into romance."

"Man is born to act. To act is to persist in affirming the worth of an end. And to persist in affirming the worth of an end is to make an ideal." ²⁷

"A teacher of law should send men forth with a pennon as well as with a sword, to keep before their eyes in the long battle the little flutter that means ideals, honor, yes, even romance, in all the dull details." ²⁸

Still another notable trait of his opinions, of course, is the instinct for the history of the law. He cannot employ and apply a principle without thinking of it as having a history. How few judges really possess the historical sense! — the sense that everything now in the world has had a "becoming" (in old Heraclitus' phrase) and that therefore its past is always worth examining, to explain its present. And, in Justice Holmes' case, his constant resort to the landmark sources of our legal history has had a special flavor, in our judicial annals, because of its rarity. It is a constant ensample — and may we say reproach? — to the scores of industrious and accurate contemporaries who never reveal the slightest interest in the law's history; or, if an interest, then no respectable acquaintance with the proper sources. "I have done my share of quotation from the Year Books," he admitted at the Langdell Dinner in 1895.

²⁷ Speech at the 50th Anniversary of Graduation, 1911.

²⁸ Speech at Northwestern University, 1902.

But it is not only by the "Y. B." citations that you will identify his opinions from those of other judges. The correct sources, whatever their range, you may expect to find that he has consulted and pillaged aptly for his need. On a chance page, for example, dealing with repayment of a dishonored draft,²⁹ appear quotations from the Selden Society's Publications, Brunner's "*Forschungen*," and Heusler's "*Deutsches Privatrecht*," to testify to a point in the history of commercial paper. And the general postulate which precedes, "Our law of negotiable paper, like the rest of our law, has had a strictly European origin and history, which are *tolerably well known*,"—was it slyly given that suggestive whip-snap at the end? For, among the judges, who else knows it? Who else, indeed, cares? One must mourn (and a public lament has elsewhere been uttered) the obstinate indifference of our judges to the history of their own law. Justice Holmes' opinions shine with an historical light, which in its luster of distinction ought to be even as the Penang Diamond,³⁰ a lure to the avid ambition of the judicial world.

And who shall say that his concise and crystallized style of historical allusion may not have been deliberately chosen as the most pointed way of preaching the propriety of history while avoiding the prosy prolixity of exegetic elaboration? May we not suppose him to be convinced that, when some reference to history is necessary in a judicial opinion, a light indication of what everyone knows, or ought to know who has studied such things, is better than something more solemn and long-winded?³¹ I believe that would be his point of view.

The best thing about Justice Holmes' taste and learning in history is that it has not dulled his sense for the practical needs in the

²⁹ *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845 (1899).

³⁰ Have you ever read Lincoln Colcord's romance, "*The Drifting Diamond*"? If not, it is worth while.

³¹ There is a good example in *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133 (1915), where the question was whether the Fourteenth Amendment was encountered fatally by a Louisiana statute forbidding a petitory action for property to be brought by a defendant in a possessory action until after judgment in the latter. The opinion continues: "From the *exceptio spolii* of the Pseudo-Isidore, the Canon Law, and Bracton, to the assize of novel disseisin, the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to. . . . And from Kant to Ihering there has been much philosophizing as to the grounds" (p. 134). And thus it sketches ten centuries in a sentence.

law of to-day. He is neither enchained by his respect for the past, as Blackstone was, nor deluded by a philosophy of historic continuity, as Savigny was. That too strong an emphasis on our continuity with the past will lead us astray, he has often warned us:—"The present has a right to govern itself, so far as it can. And it ought always to be remembered that historical continuity with the past is not a duty, it is only a necessity."³²—"Questions of here and now occupy nine hundred and ninety-nine thousandths of the ability of the world."³³—"To rest upon a formula is a slumber that, prolonged, means death."³⁴—"The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."³⁵ No other ever better exemplified the proper use of history as John Morley defined it:

"I want to know what men did in the thirteenth century, not out of antiquarian curiosity, but because the thirteenth century is at the root of what men think and do in the nineteenth. It is the Present that we seek to understand and to explain."

And yet his contentedness with the prospect of progress never rose to a too fervid faith in the virtues of reform. His most recent public utterance, "Ideals and Doubts,"³⁶ is devoted to this theme, and its closing sentence, in sounding the note of the Doubter, vouchsafes us also one of his neatest epigrams:

"It is a pleasure to see more faith and enthusiasm in the young men; and I thought that one of them made a good answer to some of my skeptical talk when he said, 'You would base legislation upon regrets rather than upon hopes.'"

But Justice Holmes' familiarity with legal history is only a phase of his broader interest in all literatures of life. I wonder whether any other man now pronouncing upon the complexities of humanity in law possesses so rich an acquaintance with all the recorded aspects of humanity? A man's private library, large or small, is not always a fair index of his range of knowledge; but in this instance it is. Putting my hand casually on one of his book-

³² Speech at the Langdell Dinner, 1895.

³³ Eulogy on Shattuck, 1897.

³⁴ "Ideals and Doubts," 10 ILL. L. REV. 1.

³⁵ Speech at the 250th Anniversary of Harvard University, 1886.

³⁶ 10 ILL. L. REV. 1 (1915).

shelves, not long ago, it touched a row of Gabriel Tarde's works on psychology, longer than any I have ever seen outside of a bibliographical list. And I have sometimes wondered how many judges or lawyers were sufficiently down to date in the fine arts to identify the Dégas who was casually mentioned to illustrate a point in a brilliant opinion on the copyright of a circus poster.³⁷ When he was recommending a friend, some three or four years ago, to enter into the fascination of Fabre's studies of bee life, the philistine friend did not then appreciate that he himself would later be seeking the hitherto unopened Fabre in the strictly technical quest of materials on the evolution of legal order in insect life. No man's methods of his own, perhaps, can be advised unconditionally for others to imitate; but Justice Holmes' generality of absorption is certainly something that the young lawyers of to-day can afford to take notice of. For it is a time when the growing lawyer must realize that law too is growing and that our profession must be amply prepared to understand the cosmic range of facts which go to shape it.

The short and the long of it is that these opinions are literature, not merely law; classics, not merely technics.

But why do I linger and digress at the threshold of my subject, — the Law of Torts? Perhaps because I cannot say what I want to say without revealing an undue egoistic bias.

For the truth is that I admire supremely Justice Holmes' Law of Torts because—he is the only writer who has (publicly) agreed with me as to the fundamentals of that subject! It cannot be proved from the records (and indeed the records would suggest the contrary), but it is a fact, that before his pioneer article ("Privilege, Malice, and Intent") appeared in the 1894 May number of this REVIEW,³⁸ I had hit upon the same general analysis, which was set forth ("The Tripartite Division of Torts") in the 1894 November number.³⁹ Until his article appeared, I had not ventured to promulgate so radical a discovery; but his printed corroboration gave me courage. What was before but subjective truth now became objective truth. Confirmed by him, I have never since doubted. And I am also convinced that the scientific discussion and harmon-

³⁷ *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239 (1903). Or Goya or Manet, for that matter. These figure in the opinion; likewise Ruskin's "Elements of Drawing."

³⁸ 8 HARV. L. REV. 1.

³⁹ *Ibid.*, p. 200.

ization of our torts system will never be possible until that basic scheme is carried out into all details by some qualified person.

What, then, was Justice Holmes' system? It expressed the doctrines of torts in three postulates:

I. "Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress."

II. "When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen. . . . If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance."

III. "But . . . in some cases, a man may even intend to do the harm and yet not have to answer for it, *i. e.* . . . the commonplace . . . that the damage is actionable if done without just cause. . . . There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of. But whether, and how far, a privilege shall be allowed, is a question of policy. . . . Not only the existence but the extent or degree of the privilege will vary with the case. . . . In all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."⁴⁰

Such is Justice Holmes' tripartite division of tort principles. Throughout nearly a hundred and fifty opinions, his system can be seen in consistent application, aided by some of the other general philosophical and social truths already alluded to. Naturally, not all, nor most, of these opinions have any concern with the general theory. But at any rate one could nearly write a treatise on torts out of this body of opinions. And it will perhaps serve as a tribute (though sadly inadequate) to this achievement of his if we now survey briefly the array of decisions, noting here and there some of the more remarkable.⁴¹

⁴⁰ 8 HARV. L. REV. pp. 1-9.

⁴¹ The writer has taken the liberty to arrange the cases in his own order of details, which is not inherent in Justice Holmes' theory.

I. THE ELEMENT OF TEMPORAL DAMAGE TO THE PLAINTIFF.

Under Corporal Damage, a principal question of course concerns the doctrine of the first Spade case,⁴² involving illness caused through fright. Here he sagely emphasizes the limitation defined in that case as purely "an arbitrary exception based upon a notion of what is practicable."⁴³ Under the Death Statute, his principal opinion dealt with the problem of an infant injured *en ventre sa mère* and dying after birth.⁴⁴

Under Societary Damage, in Defamation, the high lights are represented in the doctrine that to say of a nurse that she uses whisky is actionable if it will lead "even an appreciable fraction" of readers to regard the plaintiff with contempt;⁴⁵ and that to call a married woman a whore is defamatory, even though the acts of adultery proved were with one and the same person only.⁴⁶ In Unfair Trade, the Zither case⁴⁷ was as neat as possible an illustration of the distinction between actionable deception of the customer by imitation of the authorship, and non-actionable imitation of the mechanism without deception as to the authorship. In Copyright, the Circus-Poster case⁴⁸ must be deemed a permanent classic of the law; it is better reading than an essay of Landon or DeQuincey. But personally I feel the greater gratitude for his

⁴² 168 Mass. 285, 47 N. E. 88 (1897).

⁴³ Smith v. Postal Tel. Cable Co., 174 Mass. 576, 55 N. E. 380 (1899); Homans v. Boston Elev. R. Co., 180 Mass. 456, 62 N. E. 737 (1902); Cameron v. New England T. & T. Co., 182 Mass. 310, 65 N. E. 385 (1902).

⁴⁴ Dietrich v. Northampton, 138 Mass. 14 (1884). In Slater v. Mexican National R. Co., 194 U. S. 120 (1904) the question was whether the amount and time of payment for death was part of the remedy or of the right.

⁴⁵ Peck v. Tribune Co., 214 U. S. 185 (1909).

⁴⁶ Rutherford v. Paddock, 180 Mass. 289, 62 N. E. 381 (1902). Here belong also: Squires v. Wason Mfg. Co., 182 Mass. 137, 65 N. E. 32 (1902) (special damage in slander of title); Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275 (1897) ("words of mere suspicion" suffice); Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (1886) (multifold copies as separate libels).

⁴⁷ Flag Manufacturing Co. v. Holway, 178 Mass. 83, 59 N. E. 667 (1901). Here also belongs: Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068 (1890) (gift of secret formulas by the intestate and later a sale of them by his administrator; a very pretty case, which could be argued for an afternoon, touching its fundamentals). In Weener v. Brayton, 152 Mass. 101, 25 N. E. 46 (1890), may we not regret that he lost a chance to dissent from the scientifically misguided doctrine (now laid to rest by quite unscientifically motivated legislators) that a trade-union label may be pirated *ad lib.*?

⁴⁸ Bleistein v. Donaldson Lith. Co., 188 U. S. 239 (1903).

dissent (for that is what it is *en principe*) in the Music Record case.⁴⁹ That decision has always seemed to me truly shocking in the blow it struck at the rights of composers; and it let loose a tumultuous and needless struggle in the halls of Congress, when legislation to correct it was opposed by the ruthless ones who desired to grow rich on the unrewarded genius of others. And to the philistine and unimaginative assertion in the majority opinion: "These musical tones are not a copy which appeals to the eye"(!), it was sufficient for him to answer irrefragably:

"The result is to give to copyright less scope than its rational significance and the ground on which it is granted seems to me to demand. . . . The ground of copyright is that the person to whom it is given has invented some new collocation of visible or audible points, — of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation. . . . One would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence, *i. e.* . . . not only the invention, . . . but the result which gives to the invention its meaning and worth. . . . On principle, anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose."⁵⁰

In Proprietary Damage, one of his earliest opinions⁵¹ gave an interesting opportunity to bring to bear some of that historical learning which he had just given to the world in "The Common Law" — here on the question how far a bailee can recover for injury to the bailed chattel; and the opinion shows that history was never allowed by him to enslave modernity. Two great cases in trover — whether title is transferred by judgment alone,⁵² and whether the Statute of Limitations not merely bars an action but also transfers title⁵³ — concern rather the law of transfer of rights.

⁴⁹ *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1 (1908).

⁵⁰ *Ibid.*, pp. 19-20.

⁵¹ *Brewster v. Warner*, 136 Mass. 57 (1883). This was his first year on the Bench.

⁵² *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760 (1894). His (dissenting) opinion contains a courteous tribute (of course he was the first judge to discover them) to "the learned researches" of Mr. Ames and Mr. Maitland. I must say that I have always preferred the doctrine of the majority.

⁵³ *Chapin v. Freeland*, 142 Mass. 383, 8 N. E. 128 (1886). Here also I have had to believe that the best practical solution is squarely to hold, as Field, J., did, that these statutes are really statutes of prescription.

II. THE ELEMENT OF CULPABLE CAUSATION BY THE DEFENDANT

The exposition of this principle — “whether fraudulent, malicious, intentional, and negligent wrongs can be brought into a philosophically continuous series” — was already (before he went on the Bench) given currency in “The Common Law.” It was a great discovery, which has ever since lightened and relieved the pains of scientific fever in this *locus*. There are, however, few opinions in which the nicest questions of principle come to be dissected.

In the Coal-Hole case⁵⁴ (which was indeed his very first opinion in a tort case), the difference was emphasized between that active causation which is generally required for liability and that inaction which can make liable only by exception and, here, by statute. Passing over some related topics,⁵⁵ the most interesting opinions are found in the field of Remoteness of Consequence and Acting at Peril.

Remoteness. The Lessor-and-Lessee opinions⁵⁶ are a most enlightening series; they give him good illustration for a favorite doctrine, that “the general tendency has been to look no further back than the last wrongdoer”; and they adjust some very sensible and consistent distinctions. The application of the principle to personalty, in the Itinerant Freight-Car case,⁵⁷ completed the illumination of the principle. In the field of defamation, I have

⁵⁴ *Fisher v. Cushing*, 134 Mass. 374 (1883) (injury at a coal-hole in the sidewalk; a statute required notice of injury to be served before suit began upon the “person obliged by law to repair”; held, that the statute did not apply to defects of the sort here concerned).

⁵⁵ *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375 (1902) (ice-creating spout on a house); *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253 (1887) (grantee’s responsibility for nuisance originating before acquisition of title).

There is, of course, a long list of opinions passing upon questions of negligence for the jury — some twenty-five in all; need I cite them? I will send the list to any one who would care for it. They are full of shrewdness and good style.

There is also a half-score of opinions solving questions of municipal and other statutory liabilities, just the kind of cases that are true meat for lawyers, — that is, for the lawyers who argue them, but not entertaining to later students.

⁵⁶ *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84 (1888) (lessor’s liability for injury to traveler by snow falling from roof); *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92 (1896) (lessor’s liability for injury on a defective platform); *Quinn v. Crimings*, 171 Mass. 255, 50 N. E. 624 (1898) (injury by fall of defective fence); *O’Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387 (1901) (lessor’s liability for injury by a defective hoisting-hook).

⁵⁷ *Glynn v. Central R. Co.*, 175 Mass. 510, 56 N. E. 698 (1900).

never forgiven *Hastings v. Stetson*⁵⁸ for being so perversely wrong; and so I do not see why I should be reconciled to the Arsenic-in-Silk case,⁵⁹ which instead of paring down *Hastings v. Stetson* gave it a new application; in these days of more widespread touchiness on public sanitation, it would be worth while to raise the question again.

Acting at Peril. For damage by Buildings, the Division Fence case⁶⁰ gave us a most restorative survey of the principle, remedying the confusion caused by the unfortunate opinion of a prior judge in the Chimney case,⁶¹ and epitomizing the doctrine of "The Common Law." For Defamation, we owe him a perpetual debt for the dissenting opinion in the case of the Wrong Initials;⁶² and the sure hand of one who is merely fitting a new instance into a general system is here seen in striking contrast to the juristic helplessness of the English opinions in the later case of the Imaginary British Tripper's case.⁶³

III. THE EXCUSE ELEMENT

In this large field one must be content only to note here and there some of the opinions in which the general maxims of life and the doctrines of "Privilege, Malice, and Intent" were most individually illustrated.

⁵⁸ 126 Mass. 329 (1879) (Gray, C. J.: "One who utters a slander is [as a matter of law] not responsible . . . for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control"). This is just as perverse to human nature as Lord Ellenborough's well-known horse-pond illustration in *Vicars v. Wilcocks*, 8 East 1 (1806).

⁵⁹ *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208 (1890) (defendant physician made a false statement that there was arsenic in the silk used in the plaintiff's factory; some of the plaintiff's workmen left him, acting on a repetition of the rumor; held, no recovery, at least unless the repetition was privileged, as to which, no decision).

⁶⁰ *Quinn v. Crimings*, 171 Mass. 255, 50 N. E. 624 (1898) (injury by fall of a division fence between land of A. and the defendant; the plaintiff was on A.'s land, and the part that fell was for A. to repair). I wonder what other judge would have considered and cited the latest editions of CLERK & LINDSELL, POLLOCK, and JAGGARD, thus paying homage to scientific discussion of the law.

⁶¹ *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495 (1894).

⁶² *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462 (1893) (the defendant chronicled the arrest and fining of "H. P. Hanson, a real estate and insurance broker of South Boston"; this described the plaintiff; but the person fined was A. P. H. Hanson, another real estate and insurance broker of South Boston; the majority opinion exonerated the defendant).

⁶³ *Jones v. Hulton*, L. R. [1909] 2 K. B. 444.

In Contributory Negligence, the Closed Hatchway case⁶⁴ gave a concise demonstration of one limit of that doctrine. In the Mud-hole case the opinion pointed out the fundamental principle of election of dangers.⁶⁵ In its application to trespassers and licensees, the limitations of the principle were worked out, as to defects of the premises⁶⁶ and as to ruthless conduct of the proprietor;⁶⁷ and in the Railroad Crossing case the whole law of that part of the subject is almost codified.⁶⁸

Under Necessities for Protection from Calamities, a commonplace incident of city life, in the Drunken Passenger case,⁶⁹ is made the text for propounding one of the greatest and least developed doctrines of our law, that "a man cannot shift his misfortunes to his neighbor's shoulders," and the possible limits of it are outlined. The contrary principle has of late been put forward — "*Not kennt kein Gebot*" — by government-appointed German professors attempting to justify the Prussian Government's foul and egoistic sacrifice of innocent Belgium as a measure of self-protection against alleged would-be aggressors. Morality, chivalry, sociology, and (let us hope) Anglo-American law⁷⁰ do not sanction an insidious

⁶⁴ *Pierce v. Cunard S. S. Co.*, 153 Mass. 87, 26 N. E. 415 (1891) (a workman between decks was smothered by a fire; the defendant's agent had later closed the hatches, preventing egress). In a dozen other opinions, the questions were of only passing interest.

⁶⁵ *Pomeroy v. Westfield*, 154 Mass. 462, 28 N. E. 899 (1891) (the plaintiff drove home at night over a known dangerous road, "and allowed his horse in the darkness to go unguided around the mud-holes and past the culvert").

⁶⁶ *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369 (1889) ("No doubt a bare licensee has *some* rights; the landowner cannot shoot him"). *Sheehan v. Boston*, 171 Mass. 296, 50 N. E. 543 (1898) (walking on the grass in a park).

⁶⁷ *Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909 (1899) (the defendant's cook dashed hot water on some annoying boys who would not leave his kitchen); *Riley v. Harris*, 177 Mass. 163, 58 N. E. 584 (1900) (licensee bit by a dog).

⁶⁸ *Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 35 N. E. 554 (1893); foreshadowed by *June v. Boston & Albany R. Co.*, 153 Mass. 79, 26 N. E. 238 (1891).

I need not here notice the numerous opinions applying the principle (usually confined to the facts of each case) to employees; there are some forty of them. The most notable is *Schlemmer v. Buffalo, Rochester & Pittsburg R. Co.*, 205 U. S. 1, 11 (1906), where a brief but unique passage points out the relation between assumption of risk and contributory negligence. For lack of such juristic analysis, our present law is here in a pottering condition.

⁶⁹ *Spade v. Lynn & Boston R. Co.* (second appeal), 172 Mass. 488, 52 N. E. 747 (1899) (the plaintiff, a woman passenger, was injured by the jostling caused by the defendant's conductor forcibly removing a drunken man from the car).

⁷⁰ *Gilbert v. Stone*, Aleyn 35 (1648); *Scott v. Shepherd*, 2 W. Bl. 892 (1773) (Black-

doctrine whose abominable consequences are thus illustrated on an international scale.

Under Necessities of Industrial Livelihood, we come to some of his most distinctive opinions.⁷¹ They deserve an essay or a treatise by themselves; for they invoke and expound a whole philosophy of the economic struggle, with careful shaping of particular distinctions for the several typical situations. No man can consider himself to have a respectable conviction on this subject unless he has faced and settled with the dissenting opinion in *Vegelahn v. Guntner*. The only opinions (that I know of) to be even mentioned with it in their breadth of thinking are those of Stevenson, V. C., in *Booth v. Burgess*⁷² and of Baker, J., in *Iron Molders' Union v. Allis-Chalmers Co.*⁷³

Under Necessities of Fair Trade, the Watch case⁷⁴ furnished a notable opinion defining limitations on thievery of business good will by dwellers in a common locality; and the Pill case,⁷⁵ by users of a common process.

Under Necessities of Landed Improvements, a series of opin-

stone, J.: "Not even menaces from others are sufficient to justify a trespass against a third person"); *Queen v. Dudley & Stephens*, L. R. 14 Q. B. D. 273 (1884) (Coleridge, C. J., p. 287: "It is not needful to point out the awful danger of admitting the principle which has been contended for"); *Campbell v. Race*, 7 Cush. (Mass.) 408 (1851); *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N. W. 221 (1910); Notes in HARV. L. REV. VII, 302; VIII, 414; XIII, 599; XXIII, 490; 10 COL. L. REV. 372; John H. Wigmore and Henry C. Hall, "Compensation for Property Destroyed to stop the Spread of a Conflagration," 1 ILL. L. REV. 501.

In *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85 (1893), another instance of the Anglo-American principle had already been dealt with in an opinion of Justice Holmes.

⁷¹ *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896) (dissenting); *May v. Wood*, 172 Mass. 11, 51 N. E. 191 (1898) (dissenting); *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619 (1900); *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900) (dissenting); *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125 (1901); *Aikens v. Wisconsin*, 195 U. S. 194 (1904). I regard the majority opinion in *May v. Wood* as one of the most repulsive ever written on the subject by any court.

⁷² 72 N. J. Eq. 181, 65 Atl. 226 (1906).

⁷³ 166 Fed. 45 (1908).

⁷⁴ *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N. E. 141 (1899). In his later opinion in the *Waterman Pen* case (235 U. S. 88 (1914)), the variance from earlier doctrine was more apparent than real; but because of the general needs to-day of greater strictness of legal protection, I ventured to call public attention to the unfortunate trend of modern cases ("Justice, Commercial Morality, and the Federal Supreme Court: the *Waterman Pen* Case," 10 ILL. L. REV. 178).

⁷⁵ *Jacobs v. Beecham*, 221 U. S. 263 (1911).

ions⁷⁶ shrewdly works out sensible rules, exemplifying a favorite maxim, calculated to exhibit the dominance of life over logic, that "most differences are only differences of degree, when nicely analyzed."

Under Necessities of Free Discussion (Defamation), two great opinions are recorded. The Disbarment case⁷⁷ is a concise treatise on the privilege for publishing a report of judicial proceedings. The New York Custom-House case⁷⁸ is an equally concise but adequate summary of the principle of fair criticism, as distinguished from assertion of fact.

Under Necessities for Independence of Public Officers, we reach, in the Glanders case,⁷⁹ opposing opinions which twenty-five years ago made a landmark for the development of a principle now second to none in its importance to future governmental conditions—the principle of a public officer's immunity for private harm done by him in good faith, but by error of fact or opinion, in exercising his office. Modern officialized sanitation and the like makes this one of the great questions of the coming century. National traits and traditions are involved. Germany and France, starting at opposite extremes, have both shifted somewhat. American conditions (*pace* some of our younger Ph.D. political scientists) still pretty much fit the frank description of older British conditions by the genial De Grey, C. J.:⁸⁰

⁷⁶ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1889) (the spitefence); *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393 (1889) (same); *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1889) (silting up of a pond by cultivation of a hillside); *Bainard v. Newton*, 154 Mass. 255, 27 N. E. 995 (1891) (discharge of sewage into a brook); *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201 (1891) (overflow of sewage).

⁷⁷ *Cowley v. Pulsifer*, 137 Mass. 392 (1884).

⁷⁸ *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1 (1891).

Under *Necessities for Freedom of Parties' Resort to Courts* (Malicious Prosecution), no case seems to have given him special inspiration to a creative opinion. *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537 (1885) (advice of counsel as to probable cause); *Krulevitz v. Eastern R. Co.*, 143 Mass. 228, 9 N. E. 613 (1887) (unlawful mode of arrest); *Gray v. Parke*, 162 Mass. 582, 39 N. E. 191 (1895) (probable cause, on the facts); *Connery v. Manning*, 163 Mass. 44, 39 N. E. 558 (1895) (similar); *Burt v. Smith*, 203 U. S. 129 (1906) (preliminary injunction as evidence of probable cause).

⁷⁹ *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100 (1891) (officers were by law authorized to kill diseased horses; they killed the plaintiff's horse, but it was not diseased; the majority opinion, by Holmes, J., held that the officers were not protected from liability).

⁸⁰ *Miller v. Seare*, 2 W. Bl. 1141, 1144 (1777).

"The defendant we personally know to be a gentleman of the utmost integrity and honour; but in the country very low and obscure men often creep into the commission, and to arm them with such arbitrary powers would be of the most terrible consequence."

And so it is a satisfaction to find that our Justice has left his impress here also to guide the future.

And after all it is perhaps these trifling cases of a yeoman's plow-horse in the obscure village of Rehoboth, Massachusetts, that have given the greatest zest to our Justice, amidst the lucubration of tedious records and the balancing of acute arguments. Himself has somewhere said it (and it is a passage which confers a perdurable doctorate of dignity upon the daily judicial task):

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind. . . . This day marks the [fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power."

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